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Reconstruction of a Legal System by the Legal Doctrine

The research concerns the question of the ontology of law; namely, what theoretical views about legal ontology legal scholars hold, or, alternatively, what they conceive the law to be. My principal objective is to argue that the dogmatic understanding of law is best described in terms of legal institutions that form a system. The research is based on the theoretical framework of the institutional theory of law, interpreted and applied in the context of a contemporary debate on social ontology.

Firstly, the role of the legal doctrine in the reconstruction of a legal system will briefly be described. I will assume the transcendentalist view of the systematicity of law—i.e. that law is not immanently systematic, but rather becomes a coherent system by virtue of its interpretation/reconstruction (Płeszka, Gizbert-Studnicki 1990; Grabowski 2013)—that emphasizes the creative role of the legal doctrine in systematizing the law. Secondly, assuming law to be a coherent system, I will address the problem of what kinds of entities it consists of. Without entirely rejecting the commonly held view that a legal system consists of norms, I will argue that legal institutions should be considered as the basic constituents of a legal system as conceived by legal scholars.

Two arguments will be presented to support this view.

(1) The first is connected to the theoretical distinction between the validity and applicability of legal norms (Bulygin 1982; Schauer 1991; Navarro 2002) and the factual difference between legal dogmatic reasoning and judicial decision making. Legal scholars do not apply particular legal norms to concrete cases, but rather investigate issues of validity and search for a coherent interpretation of legal provisions so that the law is presented as a type of ideal, well-ordered system (MacCormick 1997). My claim about the central role of legal institutions in this system will be argued for by showing that to systematize the law, it is necessary to group elementary entities such as legal norms into functionally organized groups (i.e. legal institutions) that may further build other functional groups (e.g. branches of law). Such a multilevel, ordered structure of a legal system seems to pose explanatory value and affect legal reasoning (the systematic element of legal interpretation).

(2) Secondly, my main argument will be introduced. Namely, I will argue that legal institutions are emergent in the sense that they are not reducible to legal norms and are not exhaustively definable in terms of legal provisions. This thesis seems to be supported by the commonly invoked argument from the "nature/function/character of a legal institution" in dogmatic interpretive discourse. It will be argued that some legal institutions (e.g. the legal institution of marriage) reflect social institutions and therefore their legal shape depends not only on legal provisions, but also on commonly shared social attitudes concerning the corresponding social institutions (e.g. the social institution of marriage), which also raises questions regarding the sources of the law. Furthermore, it seems that a proper comprehension of some legal institutions is only possible when a prior understanding exists of the corresponding social institution. Such knowledge seems to be indispensable in both the processes involved in legal education and legal interpretation.

Lastly, one philosophical issue concerning the ontology of legal institutions will be addressed. I will respond to a possible concern that my second argument might imply a kind of naturalistic approach to law. I will argue that legal scholars' essentialist intuitions about

legal institutions can be consistent with the artefactual constructivist view of law and legal institutions.

References

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